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# Collective Guilt and Collective Punishment

*George P. Fletcher\**

*Attitudes toward collective guilt in the Middle East require us to take a closer look at guilt in the Bible. It turns out the text of Genesis is conflicted. Some passages support a theory of guilt linked with the inevitability of cleansing and punishment; other passages appear to treat guilt as a psychological state that might be cured by a confession of sins. The tension is important today in trying to understand whether the collective guilt of nations should also entail collective punishment.*

## INTRODUCTION

In the Middle East, it is difficult to be seen as an individual, as someone who is simply doing his thing not as an Arab or Jew, as a Muslim, Christian, or black-hatted Jew, but simply as a solitary man or woman who happens to live in this part of the world. There are many parts of the world that reveal a similar group consciousness — India and Pakistan, Northern Ireland — and they stand in sharp contrast to the liberal idea that the only true units of action in the world are individuals, not groups. In the Middle East, it is difficult to kill a member of the "other" side simply on grounds of personal hatred. Every killing implicitly invokes a confrontation between Palestinians and Jews, or between Islamists and settlers, or between terrorists and civilians.

This phenomenon makes the Middle East the proper arena for reflecting on the issues of collective guilt and collective punishment. When a suicide bomber attacks Israeli children, the Jews consider the entire Palestinian

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population guilty, directly or indirectly. When Jews move into the West Bank, establishing new settlements, Palestinians accuse the entire Jewish nation of "taking" Palestinian land and creating facts-on-the-ground that render a Palestinian state less feasible. This reciprocal perception of the other side's collective guilt fuels the endless cycle of violence that has tragically dispelled dreams of peace in the region. The two nations — Jews and Palestinians — are reduced metaphorically to single agents struggling against each other.

Under the pressure of the second Intifada beginning in September 2000, many otherwise sober and rational American Jews lost their sense of proportion and began advocating collective punishment for Palestinians. On the assumption that it takes an entire village to create a suicide bomber, Alan Dershowitz started proposing various ways of penalizing the entire village — including destruction of all the houses in the area. In his own words:

Israel's first step in implementing this policy would be to completely stop all retaliation for five days. Then it would publicly declare precisely how it would respond in the event of another terrorist attack, such as destroying empty houses in a village used as a base for terrorists, and naming the village in advance. The next time the terrorists attack, the village's residents would be given 24 hours to leave, and then the Israeli troops would bulldoze the houses.<sup>1</sup>

Dershowitz's colleague, Washington lawyer Nathan Lewin, has gone further and proposed the death penalty for the entire family of the suicide bomber. Lewin brazenly invokes the precedent of Amalek as a biblical warrant for collective punishment.<sup>2</sup> Both of these sophisticated, liberally-trained lawyers sense that their proposals seem outrageous to others, and therefore, both guard their flanks with some traditional legal arguments of individual responsibility.

Dershowitz shifts subtly from collective punishment to punishment for complicity in the acts of terrorists. There is no doubt that particular individuals who aid and abet the commission of terrorist acts — by providing money or weapons, counseling or encouragement — should be guilty as accessories to the murder. As to the handlers, who convince young men and women that by killing innocent children they acquire a place in Heaven, the maximum punishment would be appropriate. But it is not clear how far we

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1 Alan Dershowitz, *Why Terrorism Works: Understanding the Threat, Responding to the Challenge* 177 (2002).

2 Nathan Lewin, *Deterring Suicide Killers*, *Sh'ma: A Journal of Jewish Responsibility*, May 2002, at 11-12.

should stretch the idea of complicity to sweep up the "good Palestinians" who implicitly endorse suicide bombings but take no active steps to facilitate the attacks.

To buttress his argument for Palestinian complicity, Dershowitz relies heavily on a case (the Fall River rape case, well-known from the film *The Accused*) in which men in a bar who cheered on the rapists are presented as potentially complicitous in the rape itself. Dershowitz says that in a case like this, there is nothing wrong with thinning out the criteria of complicity so long as "the consequences imposed on the [accessories] are proportional to their complicity."<sup>3</sup> That is, if you actually raped the victim, you might get 20 years; if you held her down, 10 years; and if you merely cheered on the primary offenders, you might get a year in a jail. This is absolutely correct, even though the American and many other legal systems hold that all aiders and abettors may be punished to the same degree as the actual perpetrators are punished.

The law of complicity is firmly grounded in liberal criteria of individualized justice. It has nothing to do with collective punishment. The latter comes into play when an entire village might suffer the destruction of its houses whether the residents were directly complicitous in a particular act of terror or not. And even if they are theoretically supportive of a suicide bomber in their midst, Dershowitz hardly envisions a time-consuming, individualized trial of each person who might lose his or her home under the plan. The leap from the collective guilt of the village to its collective punishment would be automatic.

To alleviate the obvious injustice of punishing the innocent individuals as well as the guilty, Dershowitz claims that the prior warning generates a new basis for blaming those who suffer:

The policy and its implications will be perfectly clear to all the Palestinian people: whenever terrorists blow themselves up and kill Israeli citizens, they also blow up a house in one of their villages. The destruction is entirely their own fault, and it is entirely preventable by them.<sup>4</sup>

Note the moves made in this argument. First, the intervening agency of the Israeli Army drops out of the picture. The image is one of self-destruction. The criminal becomes the agent of his own punishment. But here the "criminal" consists of many different people who may or may not be the

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<sup>3</sup> Dershowitz, *supra* note 1, at 176.

<sup>4</sup> *Id.* at 177.

same as those who suffer the destruction of their homes. Thus Dershowitz's argument becomes plausible — if it is plausible — by collapsing an entire nation into a single actor and then eliminating the Israeli Army as the intervening agent. In the rhetoric of self-destruction, "terrorists" choose the punishment of their fellow nationals.

Ultimately, the argument for collective punishment in this scheme is not justice but deterrence.<sup>5</sup> The same is true of Lewin's rage-filled fantasies of hanging entire Palestinian families. Leave aside the Kantian argument condemning deterrence as a violation of human dignity, as the use of the condemned person merely as a means to the end of social protection. There is no evidence that the violent reprisals on the West Bank have had much of a deterrent impact on terrorists and suicide bombers. On the contrary, punishment perceived to be unjust has the effect of increasing the solidarity and resentment of those who suffer and, ultimately, the effect of augmenting resistance rather than decreasing it.

But neither the argument of complicity nor the shift to deterrence can assuage our sense of injustice about blaming and punishing the collective for crimes actually carried out by individuals. This leads one to suspect that behind all these rationalizations for collective punishment there lurk deeply-held sentiments of collective guilt. The proponents of collective punishment assume that Palestinians are guilty as a collective for nurturing a culture that takes pride in suicide bombers. This not an unreasonable assessment of the way in which the entire culture contributes to the actions of a few.

To round out the picture, we should consider the way in which Palestinians attribute collective guilt to Jews and Israelis and how they then justify the collective punishment of all Jews as a proper response. The Hamas and other right-wing Palestinian terrorist groups regard all Israelis, and probably all Jews, as guilty for the great sin of settling the country and defeating the combined Arab armies in the War of Independence. The continued presence of the Jews on Palestinian "ancestral land" recreates the crime in every generation and seems to represent an ongoing humiliation to Arab honor. It is not surprising that the Muslim world has become a fertile market for all the lies ever manufactured against the Jews — from early Christian myths to the latter-day *Protocols of the Elders of Zion*. Israel's partnership with the United States only exacerbates the image of Jews as exercisers of uncanny powers — able not only to kill the Son of God, but to conquer and manipulate the world's media and financial systems.

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5 *Id.* at 179.

The idea that Jews act as a corporate body obviously has its origins in the *Book of Matthew*, where the Roman Governor Pontius Pilate decides to deliver Jesus to his death, and yet as a Roman and as an individual, he is able to wash his hands of guilt and attribute the entire decision to the Jewish crowd: "And all the people answered and said, 'His blood be on us and on our children.'" (*Matthew* 27:25.) However large this crowd might have been, it surely did not include all the Jews then living, not to mention the Jews of future generations, and yet all the Jews then living and not yet born are implicitly held accountable as a corporate entity for the behavior of this crowd outside the palace of Pontius Pilate. The words of the crowd "and on our children" are fashioned to entail liability for future generations.

Holding the Jews liable as a corporate body is no different from the way Jews hold Amalek guilty across the generations for some mythical crime committed against Moses in the desert — attacking from the rear, according to *Deuteronomy* 15:16. Fortunately, we no longer know who the members of the tribe of Amalek are. If we did, those who take the commandments of the Bible seriously would face an embarrassing moral problem as to whether they were under a duty to continue to wage war against "the Amalek."<sup>6</sup>

The example of Amalek illustrates the important difference between collective guilt and a declaration of perpetual war. In the case of the Jews, the statement "His blood be on us" seems to be a self-attribution of guilt. There is no declaration of war against the Jews in *Matthew*, merely an ideological foundation for holding Jews forever guilty, both collectively and individually, for "Christ-killing." But the notion of guilt is not used in connection with Amalek.<sup>7</sup> This is a case of a war declared in perpetuity, never subject to a peace agreement.<sup>8</sup>

In practical effect, collective punishment punishes very much like perpetual war: Witness Lewin's invocation of Amalek to justify his claim of collective punishment. And recall Oliver Wendell Holmes, Jr.'s analogy between the criminal walking to the gallows and the soldier sacrificing his life in war: both die, per Holmes, for the sake of the greater good.<sup>9</sup> The superficial resemblance of war and capital punishment is that in both, some people feel justified in killing other people. Of course, there are different reasons for taking life. In the case of punishment, state officials execute offenders because they

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6 *Exodus* 17:16: "[T]he Lord will have war with Amalek from generation to generation."

7 A possible exception in *Numbers* 24:20: Amalek is described as a first among the nations but with a fate of "everlasting perdition."

8 I am indebted to Dr. Zvi Blanchard for this point.

9 Oliver W. Holmes, *The Common Law* 43 (1881) (Dover Publications 1991).

are guilty of capital offenses under pre-announced legal standards. In the case of war, soldiers kill "enemy" soldiers in order to further the ends of the armed conflict.

## I. THE THESIS: SEPARATING GUILT FROM PUNISHMENT

For the purposes of this paper, I will assume that collective guilt is a plausible, widely-shared, and sometimes healthy response to collective wrongdoing. I know that this idea disturbs liberal individualists, who think that individuals are the only conceivable unit of action. Elsewhere I have argued at length against this liberal postulate in favor of the view that the ideas of collective action, collective intention, and collective guilt all have a sound grounding in Western culture.<sup>10</sup> There is no need to rehearse those arguments here. Rather I wish to focus in this article on the specific question of whether collective guilt justifies collective punishment.

There are many who think that the recognition of personal guilt entails a craving to be punished. The paradigm for this view is Raskolnikov's moral breakthrough in Dostoevsky's *Crime and Punishment*. Having killed an old lady in order to rob her, Raskolnikov is fully aware of his deed but surely aware that society regards his action as wrong. Yet he feels no guilt. When he does recognize his guilt, he feels the need to be punished. This connection between guilt and punishment comes through in part in the German association between *Schuld* (guilt) and *Verschulden* (debt). There is a similar association in Hebrew between *chaiyav* (liable) and *chov* (debt). The suggestion is that someone who is guilty owes a debt. He or she must make amends, must do something to repair the damage. It is not so clear how one negotiates the transition from "making amends" to "craving punishment," that is, between a feeling of the necessity of doing something oneself and the sense that others must impose punishment in retaliation for the wrongdoing. But this conceptual leap — or something like it — is necessary to support the claim of a necessary connection between guilt and punishment.

Another tradition in Western thought supports the possibility of confessing one's crimes without necessarily incurring a debt to suffer punishment. The exemplar of this alternative approach are Truth and Reconciliation Commissions, which, most notably in South Africa, promise immunity from

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10 George P. Fletcher, *The Storrs Lectures: Liberals and Romantics at War: The Problem of Collective Guilt*, 111 Yale L.J. 1499 (2002).

punishment in return for a public confession of wrongdoing (with or without a confession of guilt).<sup>11</sup> According to this alternative tradition, an entire group could recognize its guilt without thereby incurring a debt — at least not a debt to suffer punishment.

The striking feature of these conflicting conceptions of guilt — one linked to punishment and the other not — is that both have strong roots in narratives of *Genesis*. In the bulk of this paper, I will attempt to explain, on the basis of a close reading of the biblical text, how both have come to resonate in our thinking about guilt and punishment. The first is rooted in the textual sources that treat guilt as a form of pollution requiring a mode of cleansing or expiation. The second derives from Chapter 42 of *Genesis*, in which ten of Joseph's brothers come to the collective conclusion that they are guilty for having ignored their brother's cries of pain. Joseph's brothers behaved like ancient predecessors to Raskolnikov. They threw Joseph into a pit without water, fully expecting him to die. They planned to cover up their deed by soaking his coat in animal blood. Thus they evidently knew that they were doing something wrong, but do not experience a sense of guilt until many years later in Egypt, when, unbeknownst to them, they come under the power of Joseph. I shall refer to the first strand in this interweaving conception of guilt as guilt-in-pollution; the second strand is aptly called guilt-in-feeling. One is external and tends toward a conception of collective guilt; the other is internal and more closely associated with individual sentiments, though nothing prevents a group of people, like Joseph's brothers, from experiencing this sentiment collectively.

## II. GUILT AS POLLUTION

In this study of guilt in the Bible, I take the Hebrew term *asham* to be equivalent to the English term "guilt." The word is so used in modern Hebrew, and there is every indication in the biblical text — as we shall see — that this is the appropriate translation from the biblical Hebrew. When we first encounter *asham* in *Genesis*, the concept is both collective and objective. The term appears in a story told in three different versions in the lives of two of the Patriarchs. The pattern is always the same: One of the forefathers of the Jewish people is about to enter a foreign land where he suspects that the "barbarians" will kill him and take his wife.

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11 *Details Announced of Commission to Probe Apartheid Abuses*, Agence France Presse, July 29, 1994, Int'l News Section.



Therefore, Abraham twice and Isaac once relive the same deception: each tells the foreign potentate that his wife is in fact his sister. In all three cases something happens to inform the potentate that either he or a man of his court is about to commit adultery.

In the first version, Abraham (then called Abram) passes Sarah (then called Sarai) off as his sister to the Egyptian Pharaoh, who takes her into court. Plagues then descend upon "Pharaoh and his household" as a sign that a sexual sin has occurred or is about to occur.<sup>12</sup> Pharaoh quickly realizes that something is wrong in the natural order and confronts Abram with his lie. In the later retelling of the same basic story (with Abram renamed Abraham and the potentate named Abimelech), the truth of sexual sin is realized not by a plague but by God coming to the King in a dream and saying, "You are to die because of the woman that you have taken, for she is a married woman."<sup>13</sup> In the third telling, when Isaac passes off Rebecca as his sister, a king also named Abimelech discovers the lie when he sees them engaging in affectionate behavior that would be incest if they were actually brother and sister. Assuming that they are not an incestuous couple, Abimelech confronts Isaac, establishes the lie, and then says, "What have you done to us? One of the people might have lain with your wife, and you would have brought guilt [*asham*] upon us."<sup>14</sup>

This is how the notion of guilt makes its appearance on the biblical stage. In those places where you would expect to find it — after Adam and Eve eat of the forbidden fruit, after Cain kills Abel, after Ham abuses his father Noah — the concept is absent. Adam and Eve feel shame, and Cain complains that his sin — *avon*, sometimes translated as punishment — is too great for him to bear.<sup>15</sup> But none of these leading characters in the biblical narrative mention their possible guilt for their misdeeds.

As it appears in the story of Isaac and Abimelech, that guilt (*asham*) is understood as something like a stain, a form of pollution on the people. The stain afflicts the entire nation of Pharaoh or Abimelech. In the second telling of this recurrent mythical confrontation, when God comes to Abimelech in a dream to warn him of the impending adultery, Abimelech responds that he is personally innocent in his heart (she told him that she was his sister) and

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12 *Genesis* 12:17.

13 *Genesis* 20:3.

14 *Genesis* 26:10.

15 Some translations of the Bible translate *avon* as "punishment"; others as "sin" or "crime." The problem is well summarized in Etz Chayim [Tree of Life]: Torah and Commentary 27 n.13 (David Lieber ed., 2001) [hereinafter Etz Chayim] (comment on the editor's choice of the word "punishment").

pleads, therefore, not only for himself but for his entire "righteous nation."<sup>16</sup> Similarly, in the third telling, Abimelech accuses Isaac of bringing guilt "upon us," on our own people — implicitly not just on Abimelech and apparently not at all on Isaac or Rebecca.<sup>17</sup> The guilt arises not from the culpability or deed of the offender but solely from the consequence: the participation in adultery. And the guilt attaches collectively to the entire nation represented by the person who engages in sinful intercourse with a married woman.

In the first recitation of this tale, Pharaoh learns of the guilt not from a dream but from the plague that descends on him and his house, reminiscent of the plague that descends on Thebes as the first sign that Oedipus has engaged in an act contrary to the natural order.<sup>18</sup> The plague is evidence of pollution, of contamination generated by human action. The idea that guilt is pollution bears several features that can only jar our modern sensibilities. The guilt is collective, it is objective, and it is the same for everyone. Also at odds with our contemporary thinking is the total irrelevance of fault or blameworthiness. The men prepared to sleep with Sarah or Rebecca have no idea that she is married and that the union would be adulterous. Nonetheless, they bring a plague on the land, and they bring "guilt" on the people. The sins of adultery and incest inhere in the act itself, regardless of personal culpability.

The remedy for guilt, in the sense the term is used in the Hebrew Bible, is to bring a sacrifice. The sacrifice cleanses the stain. Remarkably, the word used repeatedly in Chapter 5 of *Leviticus* to describe a whole range of polluting events and the appropriate sacrificial response is also *asham*.<sup>19</sup> These are sacrifices, called "guilt" sacrifices, to atone for polluting events such as touching an unclean animal.<sup>20</sup> The prescription is to bring a guilt sacrifice to atone for guilt — the same word used both for the cleansing act and the stain. The interplay here between the remedy and the deed recalls the controversy about translating the word that Cain uses in his complaint that something about his fratricide is too difficult to bear. Some think that he is referring to the

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<sup>16</sup> *Genesis* 20:4.

<sup>17</sup> *Genesis* 26:10.

<sup>18</sup> Sophocles, *Oedipus Rex* (Stanley Appelbaum ed. & George Young trans., Dover 1991). The text is not clear whether the pollution derives primarily from the patricide or the incest. The following lines of the Chorus suggest that the incest is at least a major factor: "Time found thee out/Time who sees everything/Unwittingly guilty; and arraigns thee now consort ill-sorted, unto whom are bred sons of thy getting, in thine own birthbed. O scion of Laius's race." *Id.* at 43.

<sup>19</sup> *Leviticus* 5:6, 15-16, 18-19, 25.

<sup>20</sup> *Leviticus* 5:2.

punishment, others to the crime itself.<sup>21</sup> This easy interchange of the negative and the positive, the contamination and the decontamination, reveals the tight conceptual connection between the two.

The hypothesis seems safe that the Ancient World understood these concepts in a way different from our own understanding. In contemplating whether Oedipus feels guilt or shame for his fated patricide and incest, it is often said that the Greeks at the time of Sophocles did not distinguish between the two concepts.<sup>22</sup> There are signs of both in the play. When Oedipus discovers his crime, he craves punishment as though he were guilty in the modern sense, but the method of his self-inflicted punishment — putting out his eyes and going into exile — resonates with shame. He cannot bear to see others looking at him.

While the ideas of guilt and shame are interwoven in Athens, they are distinct in Jerusalem. The biblical text recognizes a culture of shame in the story of Eden and a distinct understanding of guilt and guilt sacrifices in *Leviticus*. Even in Athens, there are clear differences between Sophocles and Aristotle, who was born a century later than the playwright; and *The Nicomachean Ethics* continues to be a guide to the general theory of responsibility and enables us to understand the concept of guilt as it is used in the modern sense.<sup>23</sup>

But the ancient sense of guilt as pollution is still with us. It is expressed in the idea of a conceptual connection between contamination and decontamination. The form that this connection takes today is the belief that a guilty act requires punishment, and the metaphors that we use to discuss retributive punishment carry forward the principle of decontamination. We share the Hegelian faith that punishing a wrongdoer vindicates the Right against the Wrong or validates the norm against those who would undermine it. In this way of thinking, the crime pollutes the moral order and the punishment serves to restore the law and the world as it should be.

### III. GUILT AS CONSCIOUSNESS OF WRONGDOING

In the modern approach to guilt, the focus is not on pollution but on the feelings of those who are guilty. The shift has been from its external impact

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<sup>21</sup> See *supra* note 15.

<sup>22</sup> Bernard Williams, *Shame and Necessity* 88-89 (1993).

<sup>23</sup> 3 Aristotle, *The Nicomachean Ethics* 1110-1111b2 (D. Ross trans., London: Oxford Univ. Press 1925).

on the world to the inner, human experience of guilt. The disengagement of the inner feeling from reality has led to the supposedly modern phenomenon of free-floating guilt, as exemplified in Kafka's novel *The Trial*. Joseph K. expects to be tried for something, but he does not know what. In another form of disengagement — this time both from the impact of the action and from the actor's sentiment — we now acknowledge that a suspect might be guilty even if he does not feel anything and resolutely protests his innocence.

A careful reading of the Joseph story reveals that this way of thinking is not uniquely modern. It is found in the book of *Genesis* as well. To grasp the alternative model of *asham* or guilt presented in the Joseph story, we should review the first part of the tale in *Genesis* 37, 39-42.

The saga begins with a built-in conflict between Joseph and his ten elder brothers. Jacob, their father, loves Joseph more than the others, and the brothers are jealous. When some brothers receive more love than others, as Abel was favored by God, we can expect enmity between brothers. The conflict among the sons of Jacob becomes more acute when Joseph relates two dreams, which his brothers interpret as a fantasy of domination over them. As the astute German commentator Claus Westermann points out, this was a startling new political idea — namely, that one brother could acquire a superior political status to his siblings.<sup>24</sup> The brothers conspire to kill him and then throw him into a pit. Reuben protests the plan to kill Joseph and suggests that they merely leave him to die. This they do and then sit down to break bread, as though they are celebrating Joseph's demise. At that point, Judah sees a caravan of Ishmaelites approaching and realizes that it might be better to sell Joseph to the voyagers than kill him and conceal their act. Apparently, it does not occur to him that selling their brother into slavery is also a wrong that they would have to conceal from Jacob and others. Before the brothers can realize Judah's plan, a band of Midianites passes by. One of the groups (the text is ambiguous on this point) lifts Joseph out of the pit and sells him to one of the passing caravans headed for Egypt. Reuben discovers that Joseph has been taken and tears his clothes in distress. To cover up their crime, the brothers then dip Joseph's coat — Jacob's gift of love to him — in the blood of a slaughtered goat and take it to Jacob as proof of Joseph's death. The traveling merchants sell Joseph into the service of Potiphar.

This is the end of the passage recounting the tale of crime and betrayal. It is worth noting that no one in this story acts as an individual. A fraternal collective acts in throwing Joseph into the pit and, later, in lifting him out.

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24 Claus Westermann, *Die Joseph-Erzählung: Elf Bibelarbeiten zu Genesis 24, 37-50* (1990).

The brothers function as a unit. Even when Reuben protests, he speaks in the first person plural. The next segment of the saga traces Joseph's rise to political power in Egypt. When he meets his brothers again, at least a decade later, he is the "governor of the land." With a famine in Canaan, Jacob sends ten of the brothers, excluding the youngest Benjamin, to find food in Egypt. When they encounter Joseph, the ten bow down to him without recognizing him, but Joseph both recognizes them and recalls the dream.

There follows a conversation in *Genesis* 42:6-21 that leads to the brothers' recognition of their guilt for the way they conspired to kill and abandon their brother. This is one of the most remarkable interactions in the corpus of biblical literature. Joseph stages both a conversation and a physical environment that lead his brothers to understand the moral dimension of facts that they had long known.

The first step in the interaction is Joseph's accusing the brothers of being spies. It is hard to know whether Joseph himself believes the charge to be true or whether he is testing his brothers. With his usual political insight, Westermann points out that spying is a characteristic feature of nations, not of families.<sup>25</sup> Joseph himself is acting as the officer of a state; his accusation of spying is designed to find out whether the brothers are the same or whether they identify themselves as a family rather than a nation. The brothers defend themselves against the charge by claiming that they are "the sons of one man in Canaan." The Westermann thesis explains this response, but it seems strained nonetheless: individuals and informal groups do, in fact, spy on each other.

A totally different approach to the accusation begins with the motive that Joseph attributes to the spying, namely, "to see the nakedness of the land."<sup>26</sup> The sexual overtones of the word "nakedness" suggest an analogy with the earlier intervention of the brothers, the "sons of Jacob," to reclaim Dinah from the house of Shechem. Whether that rescue was deceitful and improper or not, the brothers thereby demonstrated their loyalty to members of the clan. By suggesting sexual overtones to the mission of his ten brothers, Joseph might

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25 *Id.* at 73. In the first translation of the Bible into German, Martin Luther opted for a different term altogether. He translated the Hebrew term as "*Kundschafter*," which means something like "investigator." *Die Heilige Schrift*, 1 Mose 42:9 (Gideon ed. 1967).

26 The French Jewish translator André Chouraqui captures the sexual dimensions nicely in his translation: *Vous êtes venus pour voir le sexe de la terre*. *La Sainte Bible*, Entete 42:12 (André Chouraqui trans., 1989). The sexual association is missing in Luther's translation, where the passage is rendered as the "investigators" coming to see "where the land is open." *Die Heilige Schrift*, *supra* note 25, at 42:12.

be revealing his own yearning that they have to come to take him as they had schemed and fought to hold onto Dinah.<sup>27</sup>

The problematic aspect of the brothers' response to the spying charge is the seemingly gratuitous addition to their claims to be all the sons of one father: "the youngest is now with his father, and one is absent." This admission gives Joseph the opportunity to stage a dramatic recreation of one brother's being absent. First, he suggests that the brothers send one of their group to fetch their brother Benjamin. This proposal seems never to be pursued. Instead, after holding them three days in custody, Joseph suggests that they leave one of their collective in Egypt and return, as a group of nine, to fetch Benjamin.

At this point the brothers are moved to confess: "And they said to one another. But we are guilty [*asham* in the adjectival plural form *ashemim*] concerning our brother." (*Genesis* 42:21.) Great moral insights rarely arise from a finite set of factors. In this case we can point at most to a set that separately or in combination might have generated the brothers' realization that they had committed a great wrong. They are: (1) their spending three days in confinement, which somehow brought home to them the experience of Joseph in the pit; (2) Joseph's playing on their incompleteness as a set of brothers, first by insisting that they bring Benjamin down to Egypt, then suggesting that they send home to fetch him, and finally requiring that one be left behind while the others seek to complete their numbers; and (3) finally, and speculatively, the possibility that Joseph himself planted the seed by expressing a longing to be rescued as Dinah had been. The beauty of the text is enabling us to understand that this human breakthrough, this moral transformation, could have happened.

Now what do they feel guilty about? It is not about the supposed death of Joseph, not about their act of throwing him into the pit with the intention of either killing him or letting him die. Their guilt attaches to having heard and ignored his cries of anguish. Thus the guilt is displaced from the pollution to the act causing the pollution and, finally, to the victim's pleas to avoid committing the act. This subtle relocation of the guilt could either be trivial or profound. The trivial version derives from the way the brothers' use their declaration of guilt to explain their current misery: "We saw the anguish of his soul when he pleaded with us and we did not grasp it, and therefore our anguish has come over us."<sup>28</sup> Thus they rationalize their anguish as a response to their ignoring someone else's anguish. Emphasizing the latter part

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27 I am indebted to Rabbi David Silber for this interpretation.

28 *Genesis* 42:21.

of the passage converts their confession of guilt into a tactical mistake about controlling their personal fate.<sup>29</sup> It would be like regretting not having given money to a beggar on the street because the stock market crashed in the days following.

The more profound interpretation of locating the brothers' guilt in not hearing Joseph's cries brings to bear a refined view of freedom of the will, a view generally associated in contemporary philosophy with Harry Frankfurt.<sup>30</sup> By analogy to the idea of second-order volitions as the mechanism for regulating and resisting first-order impulses, we should think of guilt as a second-order failure to resist our baser impulses. It is understandable that the brothers would want to kill one of their own who sought to rule over them, but they should have resisted their base homicidal impulses. Their second-order volition should have been to heed Joseph's appeal for compassion. It does not matter much whether that appeal is implicit in Joseph's humanity or whether it is articulated as cries for help. The point is that the brothers did not hear it.

The metaphor of hearing correlates with actions producing guilt. We "hear the voice" of conscience rather than read an image of conscience in our mind, and thus it makes sense for the brothers to associate hearing with understanding the moral dimension of their actions. Further, Jewish theology emphasizes hearing over sight in the relationship with God. This is evident in Moses' confrontation with God on Mount Sinai and in the liturgical demand on Israel to "hear" and understand that God is one. By contrast, Christianity emphasizes the sense of sight and the role of images, particularly of Jesus on the cross, in sustaining faith.

Admittedly, there is a problem in understanding collective guilt as a second-order failure by a group to regulate its first-order group impulses. It would be hard to ascribe a conscience to a collective such as the brothers. Yet the brothers do react as a group to Joseph's dreams and have the impulse, as a group, to rid themselves of him. Their confession occurs as a collective event, as evidenced by their speaking to each other before they declare their collective guilt. The impact of the brothers' confession appears to dispense with the need for punishment, for Joseph hears them and he cries. (*Genesis* 42:24.) The confession itself prepares the group for the reconciliation that occurs several chapters later.

It is arguably difficult to speak of guilt in this situation, because, in

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29 Some English translations unfortunately translated *ashem* as "punished" simply because, as we noted, when guilt is understood as pollution, the decontaminating sacrifice is also called *asham* or guilt. Etz Chayim, *supra* note 15, at 260 n.21.

30 See Harry G. Frankfurt, *The Importance of What We Care About* 20 (1988).

fact, no blood was spilled and no irreversible harm occurred to Joseph. At most, the brothers were guilty of a reckless attempt to sell him into slavery (assuming that it was Ishmaelites who lifted him out and sold him to the Midianites). In the biblical and Talmudic materials, there is no recognized crime of attempt, not to mention reckless attempt, which is not considered a crime even in modern legal systems.

It is worth noting Reuben's distinctive view on their collective guilt. He tried to separate himself from the group by assessing the brothers as not having "heard" his admonition not to sin against the boy. If Reuben is speaking sincerely, then he has a limited conception of sin indeed, for he did advocate leaving Joseph to die. Now, he asserts, Joseph's "blood must be redeemed." (*Genesis* 42:22: "*Damo nidrash.*") This reference to redemption of the blood takes us back to the view of guilt as pollution. We also encounter this idea in the biblical story most similar to the tale of enmity between Joseph and his brothers, namely, Cain's jealousy and subsequent fratricide of Abel: "And God said, What have you done? The voice of your brother cries to me from the ground." (*Genesis* 4:10.) The view eventually prevails that capital punishment is necessary to release the blood of the victim.<sup>31</sup> If this were the view of Joseph's brothers about their guilt, it would be difficult to take this story as establishing an alternative to guilt as pollution. But Reuben's views, based as they are on false assumptions, are exclusively his own and serve to contrast the traditional view with the modern conception of guilt as form of consciousness.

#### IV. POLITICS AND COLLECTIVE GUILT

The conception of collective guilt explicated in the Joseph story might lead one to a fantasy of reconciliation in the Middle East. Jews would discover and confess guilt for having displaced Palestinians from their lands in 1948, and Palestinians would discover and confess guilt for their nearly sixty-year campaign of delegitimation and terrorism against Israel and its citizens. By recognizing the wrongs they have committed, both sides would concede their guilt, but would not incur any debt to be punished. They would be in the position of Joseph's brothers, who could achieve reconciliation without punishment for their wrong.

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31 See *Genesis* 9:6 ("Whoever spills the blood of a human being, by a human being will his blood be spilled."). On the magical significance of releasing the blood of the decedent, see David Daube, *Studies in Biblical Law* 122-23 (1947).



Would that this fantasy were politically feasible. It is not because neither side would trust the other to resist exploiting the confession under the supposed rationale that guilt entails punishment and the punishment they have in mind would be subject to execution by their respective military organizations. The most I can claim for this argument based on biblical sources is that in fact there is no necessary connection between guilt and punishment and that — in theory, at least — confessions of collective guilt are possible without an implied justification for punishment in response.